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*Preserving America's Heritage*

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Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7th Street SW  
Room 10276  
Washington, DC 20410-0500

REF: FR-6187-N-01 White House Council on Eliminating Regulatory Barriers to Affordable Housing;  
Request for Information

To Whom It May Concern:

The Advisory Council on Historic Preservation (ACHP) is an independent federal agency that promotes the preservation, enhancement, and sustainable use of the nation's diverse historic resources, and advises the President and Congress on national historic preservation policy. The Secretary of Housing and Urban Development currently is serving a term as a presidentially designated member of the ACHP. The ACHP welcomes the opportunity to respond to the referenced Request for Information (RFI) since historic buildings are well-suited to help meet the nation's affordable housing needs and are a critically important subset of naturally occurring affordable housing. Our comments on several of the RFI's questions are outlined in the attached document.

If you have any questions, feel free to contact John M. Fowler, the ACHP's Executive Director, at [jfowler@achp.gov](mailto:jfowler@achp.gov).

Sincerely,

Aimee K. Jorjani  
Chairman

Attachment

**Comments of the Advisory Council on Historic Preservation  
In Response to FR-6187-N-01 White House Council on Eliminating Regulatory Barriers to  
Affordable Housing; Request for Information**

**Selected Questions and Responses**

*(1) **Federal Barriers to Affordable Housing Development.** HUD requests comments that identify specific HUD regulations, statutes, programs and practices that directly or indirectly restrict the supply of housing or increase the cost of housing. In thinking about the impact that the laws, regulations, statutes, programs and policies of HUD programs may have on the housing construction and development industry, please consider:*

*a. Federal laws, regulations, and administrative practices of HUD programs that directly or indirectly artificially raise the costs of housing development and contribute to shortages in housing supply, in HUD's program implementation itself, or because of their impact on State, local, and Tribal government policymaking. Do these laws, regulations, or administrative practices produce any benefits to the resident, homeowner, state, or locality that would be eliminated if the requirement were reduced or eliminated?*

Historic and existing buildings are well-suited to help meet the nation's affordable housing needs and are being successfully adapted for use as low- and moderate-income housing. They are a critically important subset of naturally-occurring affordable housing. Their rehabilitation typically is cheaper than new construction, and they frequently are located in neighborhoods with established infrastructure, good access to mass transit, and job opportunities. Reuse of historic buildings for affordable housing also preserves the historic character of neighborhoods and communities, furthering the national policies established by the Congress in the National Historic Preservation Act of 1966 (NHPA).

To help ensure that historic preservation is considered in affordable housing efforts, rehabilitation and new construction projects may be subject to historic preservation review at the federal, state, and/or local level. This sometimes gives rise to a perception or assumption that historic preservation reviews can be barriers to affordable housing development. Quite often the problem lies with lack of knowledge of preservation review requirements. When fully integrated into regular project planning and scheduling, such reviews can benefit project development without causing delay or increasing project costs.

At the federal level, there are two review processes that may come into play with affordable housing projects. When HUD provides funding for an affordable housing project or there is any other federal involvement, the project is subject to review under Section 106 of NHPA (54 U.S.C. §306108). Section 106 requires federal agencies to consider the effects of federal projects on historic properties. (For some HUD programs, such as the Community Development Block Grant program, local communities have been statutorily delegated the legal responsibility to comply with Section 106.) The Advisory Council on Historic Preservation (ACHP) has published regulations (36 CFR Part 800) that guide federal agencies and other participants in the Section 106 process. HUD has embodied these in its implementing environmental regulations (24 CFR Part 50). As with other environmental reviews to which affordable housing projects are subject, Section 106 review is a process that requires a commitment of time and coordination on the behalf of project sponsors. However, as discussed in the response to Question 1(b), the Section 106 process is flexible; it can be (and has in the past been) tailored to accommodate the unique requirements and issues of affordable housing projects.

Section 106 does not mandate the preservation of historic properties, but does require the federal agency involved to consider ways to address adverse effects to properties that are listed on or eligible for the National Register of Historic Places. Conducted in consultation with stakeholders,

the process benefits the community by ensuring that a project does not alter or destroy the community's historic character without careful consideration and possible mitigation. This is particularly important in the case of new infill construction in historic districts and when historic buildings will be reused as affordable housing. Also, because the Section 106 process has provisions for effective public involvement, it benefits the community by providing a forum for input from residents regarding the impact of proposed projects on historic properties.

Historic building reuse for affordable housing can also qualify for the federal Historic Tax Credit (HTC). This incentive allows a 20% tax credit for the rehabilitation of income producing historic properties and provides capital for rehabilitation of historic housing stock or the adaptation of other historic buildings for residential use. According to the National Park Service (NPS), HTC projects created 6,152 affordable housing units in FY 2018. Since creation of the HTC in FY 1977, 166,210 affordable housing units have been created in historic buildings through projects utilizing this credit. The HTC often is twinned with the Low-Income Housing Tax Credit, and 35 states have state historic tax credits that can be used in tandem with the HTC. The opportunity to utilize and leverage the HTC is an important benefit for project sponsors and in some cases may make the difference as to whether or not a project is financial feasible.

Review of projects that are seeking the HTC is administered by the NPS and, while sharing the same goals, is a separate process from Section 106 review. The NPS works with State Historic Preservation Officers to review whether HTC projects meet the Secretary of the Interior's Standards for Rehabilitation. Such review requires a commitment of time and coordination on the behalf of project sponsors and meeting the Standards can add costs. However, the NPS has taken steps to encourage flexibility in HTC reviews.

*b. Recommendations, strategies, solutions or best practice models that have been established to streamline, reduce or eliminate overly restrictive construction and development regulations, requirements or administrative practices identified above.*

Integrating historic preservation reviews into project planning and schedules is an important strategy to promote timely and effective reviews. Last minute attempts to complete preservation reviews after project planning is nearing completion has the potential to lead to delays. To prevent this, it is important that HUD staff and award recipients remain aware of their preservation review responsibilities. HUD has been proactive in developing and providing guidance on fulfilling the requirements of the regulations (36 CFR Part 800) for Section 106 of the National Historic Preservation Act and HUD's implementing environmental regulations (24 CFR Part 50). This guidance, as well as a webinar on using the Historic Tax Credit for affordable housing, currently is available through the HUD Exchange web site. The Advisory Council on Historic Preservation (ACHP) encourages HUD to continue making such information available through a variety of channels. The ACHP also offers a venue for outreach to the state and local level.

While integrating preservation reviews into project planning increases the likelihood of a timely and effective review, there also are a number of options for tailoring and streamlining the Section 106 review process. These "program alternatives" can be used to accommodate the unique requirements of specific federal agency projects or programs, including affordable housing projects. Program alternatives can be used to establish a phased review process, exempt certain activities from review, expedite timeframes for review, provide for standard mitigation measures, or otherwise tailor and streamline review. Thousands of communities rely on the use of a Programmatic Agreement to streamline the Section 106 review when administering HUD funds, which allows for the expeditious use of these monies in community revitalization and rehabilitation activities. These communities range in population size, but for cities such as Detroit, Philadelphia, and Los Angeles, a Programmatic Agreement is an essential tool in ensuring that reviews are timely and efficient.

In 2006, the ACHP issued a *Policy Statement on Affordable Housing and Historic Preservation*, which includes several principles that address the importance of flexibility and streamlining in Section 106 review of affordable housing projects. Principles in the policy statement include:

- review of effects in historic districts should focus on exterior features rather than interior;
- the need for archaeological investigations should be avoided; and
- the ACHP encourages streamlining the Section 106 process to respond to local conditions.

Both HUD and the ACHP have worked to disseminate this policy statement to help guide tribes, states, local communities, and project sponsors toward making the Section 106 review process as efficient and effective as possible. It may be timely to review the use of the policy statement to determine if there are additional areas that should be addressed. It would also be useful for HUD and the ACHP to undertake a new effort to inform recipients of HUD funding for affordable housing projects about the availability of this guidance.

*d. What is the potential impact, positive or negative, of streamlining, reducing, or eliminating the identified regulations, requirements or administrative practices?*

As discussed in the response to Question 1(b), issues in the historic preservation review processes arise not because of the underlying procedural requirements but rather from the application of standards used to determine appropriate preservation treatments. Clarification and flexing of these standards as applied to affordable housing projects has resulted in efficiencies under Section 106 of the National Historic Preservation Act and the federal Historic Tax Credit (HTC) for the rehabilitation of income producing historic properties. Likewise, the ability to adapt procedures provided by the Section 106 regulations has been employed for many years to make the system work better. This kind of administrative streamlining, targeted to specific issues, permits important affordable housing projects to move forward while helping to ensure that the historic character of communities is preserved. By doing so, these processes can continue to constructively manage change in historic communities, using existing tools to address actual impediments as they are identified.

Because the review requirements of Section 106 are statutorily mandated, elimination of the implementing regulations would leave uncertainty and confusion as to how compliance with the law would be done. Drastic alteration of Section 106 review would be highly detrimental to local communities, stripping local citizens of a tool that provides them a critical voice in determining how federal projects affect the historic properties that embody the community's historic identity.

Similarly, review of HTC projects by the National Park Service (NPS) is a statutory requirement. Curtailing NPS and State Historic Preservation Officers would undermine the process that ensures developers respect the historic character of the historic properties they reuse and are not rewarded with a tax incentive when negatively affecting that character. Elimination of the HTC completely would remove an important funding source that often is essential to the complex multi-source funding structure needed to make some projects feasible. Doing away with the HTC would reduce the number of historic buildings being converted to affordable housing.

*(2) State Barriers to Affordable Housing Development. Since the 1920s States have given ultimate zoning authority to their local government units. Additionally, States have left it to the local jurisdictions to create their own governing structure and to delegate further authority across local government silos, often leading to fragmented, overlapping or duplicative review processes of construction projects. Finally, States almost always impose a bifurcated review process for larger scale infrastructure projects that require environmental review. However, States, by their regional nature, are more attuned with how local policies have larger economic consequences to regional economies. In thinking about the role of the state in the building construction industry, consider the following questions:*

*b. What are the policy interventions, solutions or strategies available to State decision makers for incentivizing local governments to review their regulatory environment? To aid them in streamlining, reducing or eliminating the negative impact of local and State laws, regulations, and administrative practices identified in the question above?*

By passing legislation enabling local communities to take certain actions in their land use plans and building codes, states can incentivize change that can promote affordable housing development. For example, last year California passed legislation that will allow property owners to build a backyard home of at least 800-square-feet as well as convert a garage, office or spare room into an additional living space. Permitting such accessory dwelling units allows for increasing density in established neighborhoods of single-family homes. In historic districts, the flexibility to create accessory dwelling units (through new construction or use of space in an existing single-family dwelling) enables increasing density while preserving historic homes and the historic character of neighborhoods. Another way to make existing building stock available for affordable housing is modifying building code restrictions that prohibit or discourage the use of upper-story spaces in small-scale commercial buildings. These kinds of non-federal actions can promote the use of existing historic properties to provide additional affordable housing while state and local preservation review processes ensure that such development maintains the historic characteristics that local citizens value in their community.

*(3) **Local Barriers to Affordable Housing Development.** While a traditional characterization for the adoption and maintenance of some barriers to affordable housing development is that they reflect a “Not in My Back Yard” (“NIMBY”) disposition, their widespread and long-term prevalence suggests some substantive bases for their existence. For the purposes of this RFI, we define “local” to include all local government units that have constitutional authority given by the State to make decisions on land use planning and growth management, including cities, towns, parishes, designated places, counties, and rural communities, as well as regional entities that have decision-making authority on these land-use issues under State statutes. When identifying regulatory barriers and understanding the impacts on housing costs, there are several issues to consider:*

*c. What are the policy interventions, solutions or strategies available to local decision makers for streamlining, reducing or eliminating the negative impact of these laws, regulations, and administrative practices identified in the question above?*

Some local land use laws and building codes were put into place at a time when urban density was perceived as negative, something to be legislated against rather than encouraged as a solution to a problem, i.e., lack of affordable housing. Changes to such provisions in existing neighborhoods could facilitate better use of the naturally occurring affordable housing stock. As noted in the response to Question 2(b), local communities should consider the potential benefits of permitting accessory dwelling units in single-family houses or on single-family lots and use of upper stories in commercial buildings for housing. Reexamination of these types of land use and building code issues is particularly important in historic districts, since changes would encourage increased density while still allowing for the preservation of the neighborhood’s historic character. Such changes could present a useful alternative to the replacement of existing historic structures with incompatible high-rise or other multi-family construction that would destroy the underlying historic character of a neighborhood.